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SCL Tea & Tech: "Limitation and Exclusion Clauses, or How to Breach Your Contract With Impunity" with Gideon Shirazi

Gideon (a barrister at 4 Pump Court) discussed the law governing the operation and interpretation of limitation and exclusion of liability clauses, focusing on IT contracts gone wrong. 217 SCL members tuned in.

What are exclusion clauses?

Gideon began by discussing what an exclusion clause actually is. They vary from straight-forward simple clauses to the very complex. The more complex include provisions such as caps, so-called super-caps which may be used for issues such as data breaches, aggregate claims, rolling caps or scope-limited caps. Exclusions may include consequential or special categories of loss/claims. They may also set contractual time limits of days up to years to make claims – in addition to statutory limitation periods. Finally, there may be carve-outs, e.g. they may not apply to IP claims or claims for liability that may not be excluded, such as liability for personal injury.

What are they important?

They are important during contract negotiations, for arranging insurance cover and when disputes arise.

Analysing exclusion clauses

There are three stages of analysis:

- Incorporation – does the clause form part of the contract?
- Interpretation – what does it mean?
- Regulation – usually UCTA 1977 or the Consumer Rights Act 2015, and others depending on context, e.g. consumer credit legislation for fintech.

Incorporation

Parties need notice of "surprising" clauses. The more you exclude, the more notice you need to give: the more obvious it has to be. Gideon talked about the April fool "immortal soul" clause which Game Station used in its terms and conditions in 2010 and said that he would not have expected it to be found to be effectively incorporated.

Generally, if you sign a contract you are bound; but with unsigned contracts you need plenty of notice of strange clauses. Gideon said that excluding loss of profit is not very unusual, but something more unusual would need to be highlighted. Often capital letters are used, which makes exclusion clauses are more difficult to read, and the English courts have not considered it sufficient. Gideon mentioned Lord Denning's well-known "red hand pointer" test where some clauses could only be valid if they were printed in red with a red hand pointing to them.

However, some contracts have remarkably extreme clauses and even a signature may not be enough. An example of this is with online contracts where people routinely sign up without reading the terms. Gideon also mentioned the *Bates v Post Office* case between sub-postmasters and the Post Office where Fraser J

considered the exemption (and some other) clauses in the contracts and considered that they were not incorporated because they were so extreme.

Gideon also considered the *contra proferentem* rule – the courts go back and forth on this, but it will generally depend on the factual matrix. It is usually a rule of last or very late resort, but it does still exist. There is still a presumption that people do not intend to give up their rights, especially if there is a significant imbalance between the parties – e.g. a large multi-national and an SME or consumer.

He also considered indirect and inconsequential losses and described the "rift" between the UK and a couple of US jurisdictions and the rest of the common law world. The *Hadley v Baxendale* approach is very narrow and is commercially surprising as English courts usually try to give effect to the intention of the parties not technical rules of interpretation. It still reflects the current law, but there are moves towards change, e.g. in shipbuilding contract guarantees where damage is consequent on a defect.

Regulations

The Unfair Contract Terms Act 1977 regulates B2B contracts. It is not possible to exclude liability for:

- death/personal injury
- title/enjoyment of goods
- negligence subject to the reasonableness test
- contract others have written such as standard terms, courts have adopted a generous view

Exemption clauses are subject to the UCTA reasonableness test. Courts will generally uphold commercial contracts where parties have similar bargaining power and/or access to lawyers but depends on gravity of clause/infringement on rights.

There are exclusions to the exclusions in insurance contracts, creation/transfer of IP rights/interests and creation/transfer of securities/rights insecurities, as well as international supply contracts.

Discussion

There was then a question and answer session with a discussion about current trends, e.g. using super-caps for data breaches, passing on liability for fines and the interplay between indemnities and caps.